

1 JOSHUA A. SLIKER, ESQ.
2 Nevada Bar No. 12493
3 KYLE A. HOYT, ESQ.
4 Nevada Bar No. 14886
5 **JACKSON LEWIS P.C.**
6 300 S. Fourth Street, Suite 900
7 Las Vegas, Nevada 89101
8 Telephone: (702) 921-2460
9 Facsimile: (702) 921-2461
10 Email: joshua.sliker@jacksonlewis.com
11 Email: kyle.hoyt@jacksonlewis.com

12 *Attorneys for Defendant*
13 *Tesla Motors, Inc.*

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 LYNN THOMPSON,
17 Plaintiff,
18 vs.
19 TESLA MOTORS, INC.; ONQGLOBAL,
20 INC.; DOES 1-50,
21 Defendants.

22 Case No. 3:21-cv-00238-HDM-CSD

23 **DEFENDANT TESLA MOTORS, INC.’S
MOTION TO STAY DISCOVERY
PENDING DECISION ON MOTION TO
DISMISS**

24 Defendant TESLA MOTORS, INC., by and through its counsel Jackson Lewis P.C., hereby
25 files its Motion to Stay Discovery Pending Decision on Motion to Dismiss (ECF No. 44). This
26 Motion is based on the following Memorandum of Points and Authorities, all pleadings and
27 documents on file with the Court, and any oral argument that the Court deems proper.

28 **MEMORANDUM OF POINTS AND AUTHORITIES**

29 **I. INTRODUCTION**

30 Plaintiff Lynn Thompson (“Thompson” or “Plaintiff”) asserts a single claim of retaliation
31 in violation of the Sarbanes Oxley Act (“SOX”) following a stint as an Electrical Superintendent
32 contractor with Defendant OnQGlobal (“OnQ”) in which he was contracted to work for Tesla
33 Motors, Inc. (“Tesla”). *See generally, compl.* The court should stay discovery in this case because
34 Tesla’s filed Motion to Dismiss (ECF No. 44) is a dispositive motion that is likely to be granted

1 under statute of limitations grounds, and does not require any discovery for review. Similarly,
 2 Defendant OnQ has also filed a Motion to Dismiss (ECF No. 42) which if granted, would completely
 3 bar Plaintiff's claims against it. As a "preliminary peek" of Tesla's Motion to Dismiss will show,
 4 Plaintiff's SOX claim is time-barred because he filed his complaint with the Occupational Health
 5 and Safety Administration ("OSHA") outside the limitations period following his June 7, 2018
 6 report of copper wire theft to law enforcement and same-day notification not to return to the site.
 7 Moreover, Tesla has already been burdened with Plaintiff's action filed in the Second Judicial
 8 District Court, State of Nevada which later went into arbitration (the "Arbitration") and resolved in
 9 favor of Tesla on all claims, including a determination that Plaintiff was not terminated for making
 10 complaints of copper wire theft – the central claim in this litigation. As such, Rule 1's principles of
 11 fairness and justice compel a stay of discovery pending resolution of the Motion to Dismiss.

12 II. BACKGROUND

13 Plaintiff initiated this action on May 21, 2021. ECF No. 1. On October 1, 2021, Tesla filed
 14 a Motion to Stay this case pending completion of arbitration stemming from Thompson's complaint
 15 filed in Nevada's state court system and related Arbitration. ECF No. 13. After full briefing on the
 16 Motion to Stay, the court ordered a stay on November 3, 2021. ECF No. 22. On April 4, 2022, the
 17 court ordered the parties to submit a status report and whether the stay should be lifted. ECF No. 24.
 18 Following the filing of status reports from Tesla, which OnQ joined, and Plaintiff, the court issued
 19 an order lifting the stay. ECF No. 31. Tesla filed its Motion to Dismiss Plaintiff's Complaint on June
 20 3, 2022. ECF No. 44.¹ The Motion is based on Thompson's failure to file a timely file a complaint
 21 with OSHA, which sets a procedural bar to Plaintiff's sole claim for relief.

22 III. LEGAL ARGUMENT

23 A. The Court Should Stay Discovery Pending Determination of Defendant's Motion.

24 "Courts have broad discretionary power to control discovery." *Kor Media Group, LLC v.*
 25 *Green*, 294 F.R.D. 579, 581 (D. Nev. 2013) (citing *Little v. City of Seattle*, 863 F.2d 681, 685 (9th
 26

27 ¹ For the sake of brevity, Tesla incorporates the factual background of the Motion to Dismiss to the extent it is useful to
 28 the court's review of the instant Motion to Stay Discovery. ECF No. 44, 1:22-6:18. In doing so, Tesla does not admit
 any of the facts alleged in the Plaintiff's Complaint.

1 Cir. 1988)). There is no automatic or blanket stay simply for the filing of a dispositive motion. *Id.*
 2 (quoting *Tradebay, LLC v. eBAY, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011)). However, “motions to
 3 stay discovery may be granted when: “(1) the pending motion is potentially dispositive; (2) the
 4 potentially dispositive motion can be decided without additional discovery; and (3) the Court has
 5 taken a ‘preliminary peek’ at the merits of the potentially dispositive motion and is convinced that
 6 the plaintiff will be unable to state a claim for relief.” *Id.* Moreover, when deciding whether to grant
 7 a stay of discovery, a court is guided by the objectives of Federal Rule of Civil Procedure 1 that
 8 ensures a “just, speedy, and inexpensive determination of every action.” *Id.* (additional internal
 9 citation omitted). Courts evaluating the propriety of a stay have cautioned against the use of
 10 resources that may be rendered unnecessary, noting the simple, but accurate principle: “Discovery
 11 is expensive.” *Tradebay*, 278 F.R.D. at 601 (D. Nev. 2011). The Court weighs the expense of
 12 discovery against “the underlying principle that a stay of discovery should only be ordered if the
 13 court is ‘convinced’ that a plaintiff will be unable to state a claim for relief.” *Id.* at 603. A magistrate
 14 judge may take a “preliminary peek” at the pending dispositive motion, without prejudging its
 15 outcome, to evaluate the propriety of an order staying . . . discovery with the goal of accomplishing
 16 the objectives of [Fed. R. Civ. P.] 1.” *Id.* The “standard [for staying discovery] is not easily met.”
 17 *Kor Media Group*, 294 F.R.D. at 583. Discovery should not be delayed simply because a non-
 18 frivolous dispositive motion has been filed, but upon showing that discovery “is a waste of effort.”
 19 *Id.*

20 A motion to stay discovery at the motion to dismiss stage is different from at the summary
 21 judgment stage. *See United States CFTC v. Banc de Binary, Ltd.*, 2015 U.S. Dist. LEXIS 5789, at
 22 *5-6 (D. Nev. Jan. 15, 2015). Because a decision at the motion to dismiss stage generally cannot
 23 look outside the pleadings, “a discovery stay pending a motion to dismiss may result in ‘the just,
 24 speedy, and inexpensive determination of [an] action’ because discovery is costly and unnecessary
 25 to adjudicate a merited motion to dismiss.” *Id.* at *6 (quoting FRCP 1).

26 A “preliminary peek” at Tesla’s Motions to Dismiss demonstrates that Plaintiff likely
 27 cannot maintain his action. Plaintiff alleges he was terminated on June 7, 2018 after reporting a
 28

1 copper wire theft internally to security and then providing a witness statement to the Storey County
 2 Sheriff's Office. Although he was on notice of a claim of retaliation at various points between April
 3 2018 and June 7, 2018, because he claims Tesla managers threatened him with termination if he
 4 continued to investigate and report theft, leading him to fear making reports, there can be no dispute
 5 that Plaintiff's claim accrued by June 7, 2018, when he was allegedly instructed not to return to the
 6 Gigafactory site. Despite the statutory requirement that he make a complaint to OSHA within 180-
 7 days of June 7, 2018, Plaintiff failed to do so on a timely basis. As a result, his claim is barred.

8 As such, justice strongly favors postponing discovery while the dispositive motion is
 9 pending, in light of the substantial legal challenge to Plaintiff's Complaint (ECF No. 1).
 10 Additionally, Tesla's Motion to Dismiss (ECF No. 44) is likely dispositive of Plaintiff's sole claim
 11 asserted against it and no discovery is necessary for the court to reach a decision. Therefore, this
 12 Court should stay discovery.

13 ***1. Defendant's Motion is Potentially Dispositive.***

14 A stay is warranted because Defendant's Motion to Dismiss is potentially dispositive of the
 15 case. Plaintiff attempts to assert a single claim for violations of the Sarbanes Oxley Act 18 USC §
 16 1514A, which prevents retaliation to qualifying whistleblowers. Defendant has moved to dismiss
 17 Plaintiff's claim pursuant to FRCP 12(b)(6) for failure to state a legally cognizable claim as it is
 18 time-barred. If the court grants the Motion to Dismiss, the case against Tesla would be terminated.
 19 As such, the first prong is satisfied and weights in favor of a stay of discovery. *See Tradebay*, 278
 20 F.R.D. at 608.

21 ***2. Defendant's Motion Can Be Decided Without Additional Discovery.***

22 Defendant's pending dispositive Motion to Dismiss is based on Federal Rule of Civil
 23 Procedure 12(b)(6), which itself incorporates the principle that no further discovery is required to
 24 decide the Motion. That is, when "considering a motion to dismiss under Federal Rule of Civil
 25 Procedure 12(b)(6), the court asks only whether the pleadings are sufficient to establish a claim, ***not***
 26 ***whether the Plaintiff could find evidence to support the pleadings.***" *Tracy v. United States*, 243
 27 F.R.D. 662, 664 (D. Nev. 2007) (emphasis added) (citing *Lee v. City of Los Angeles*, 250 F.3d 668,

688 (9th Cir. 2001)). As a court in this district noted, “a discovery stay pending a motion to dismiss may result in ‘the just, speedy, and inexpensive determination of [an] action’ because discovery is costly and unnecessary to adjudicate a merited motion to dismiss.” *United States CFTC v. Banc de Binary, Ltd.*, No. 2:13-cv-992-MMD-VCF, 2015 U.S. Dist. LEXIS 5789, at *6 (D. Nev. Jan. 15, 2015). Accordingly, the second prong is also satisfied and warrants granting a stay of discovery.

3. A “Preliminary Peek” at the Merits of Defendants’ Motions to Dismiss Warrants Granting of a Stay.

When reviewing a motion to stay discovery, courts in the District of Nevada have explained what must be evaluated. In *Tradebay*, the Court stated:

[T]his court’s “preliminary peek” at the merits of the underlying motion is not intended to prejudge its outcome. Rather, this court’s role is to evaluate the propriety of an order staying or limiting discovery with the goal of accomplishing the objectives of [FRCP] 1. With Rule 1 as its prime directive, this court must decide whether it is more just to speed the parties along in discovery and other proceedings while a dispositive motion is pending, or whether it is more just to delay or limit discovery and other proceedings to accomplish the inexpensive determination of the case.

278 F.R.D. at 601.

A discovery stay may be entered if the court is convinced the plaintiff does not have a claim for relief. *See id.* (quoting *Tradebay*, 278 F.R.D. at 603) (additional citations omitted). Discovery should not be delayed simply because a non-frivolous dispositive motion has been filed, but upon showing that discovery “is a waste of effort.” *Id.* A motion to stay discovery at the motion to dismiss stage differs from one brought at the summary judgment stage. *See United States CFTC*, 2015 U.S. Dist. LEXIS 5789, at *5-6. Because a decision at the motion to dismiss stage generally cannot look outside the pleadings, “a discovery stay pending a motion to dismiss may result in ‘the just, speedy, and inexpensive determination of [an] action’ because discovery is costly and unnecessary to adjudicate a merited motion to dismiss.” *Id.* at *6 (quoting FRCP 1).

Here, without rehashing Defendant’s Motion to Dismiss, Plaintiff is barred from recovery because he made an untimely complaint to OSHA. ECF No. 44, 7:22-12:2. SOX requires that a plaintiff file a complaint with OSHA within 180 days after a violation of the act has occurred. 18

1 USC § 1514A(b)(2)(D). Plaintiff alleges that sometime after he began reporting copper wire theft
 2 beginning in April of 2018, he was threatened by Tesla management to stop investigating, or he
 3 would be terminated. Although Plaintiff artfully avoids giving a date to this alleged “threat,” the
 4 statute of limitations for a violation of SOX would have begun then because Plaintiff was on notice
 5 of a prima facie claim of retaliation. *See Coppinger-Martin v. Solis*, 627 F.3d 745, 749 (9th Cir.
 6 2010) (citations omitted). However, even when taking the date of June 7, 2018 – when plaintiff
 7 alleges Tesla instructed him not to return to the Gigafactory site several hours after a complaint of
 8 copper wire theft to law enforcement – his complaint to OSHA remains untimely by one day. It was
 9 submitted 181 days after June 7, 2018. As such, his claim is time-barred. *Dig. Realty Trust, Inc. v.*
 10 *Somers*, 138 S. Ct. 767, 776 (2018). Although plaintiff alleges that he did not learn of Tesla’s alleged
 11 motive in terminating him until after June 7, 2018, the 180-day time period is not tolled because
 12 proving discriminatory motive is not part of his prima facie retaliation claim. *Coppinger-Martin* 627
 13 F.3d at 750.

14 Plaintiff’s claim is also barred by the doctrine of collateral estoppel if the Court grants
 15 Tesla’s Motion to Confirm the Arbitration Award. ECF No. 44, 12:25-16:17. This is because the
 16 issue at stake in this case is whether Tesla terminated its relationship with Plaintiff “because of his
 17 reporting of misconduct and theft to his TESLA supervisors, his ONQ supervisor, and the County
 18 Sheriff.” ECF No. 1, ¶ 38. That is identical to the central issue that was at stake in the arbitration
 19 proceedings—why Plaintiff’s relationship with Tesla ended. Ex. 3. Indeed, it was the foundation for
 20 virtually all of his claims in the arbitration proceeding. *Id.* at ¶ 22; ¶ 25 (alleging Tesla pressured
 21 OnQ not to allow Thompson to work at the Gigafactory because of his reports of theft); ¶¶ 31-35;
 22 ¶¶ 45-48; and ¶¶ 74-77; *see Feldman-Boland v. Stanley*, No. 15cv6698, 2016 U.S. Dist. LEXIS
 23 90994, at *7 (S.D.N.Y. July 13, 2016) (“The underlying claims need not be identical for collateral
 24 estoppel to apply.”).

25 Further, Plaintiff’s claim fails as a matter of law because he was not Tesla’s employee which
 26 is necessary for him to avail himself of SOX’s protections. ECF No. 44, 16:17-20:28; *See Day v.*
 27 *Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008).

1 Additionally, Plaintiff's claim fails because he did not engage in protected activity that
 2 relates to shareholder fraud. ECF No. 44, 21:1-19. To constitute protected activity under SOX, an
 3 "employee's communications must definitively and specifically relate to [one] of the listed
 4 categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1)." *Van Asdale*, 577 F.3d
 5 at 996-97 (quoting *Platone v. FLYi, Inc.*, 25 I.E.R. Cas. (BNA) 278, 287 (U.S. Dept. of Labor Sept.
 6 29, 2006)²); "The employee must show that his communications to the employer specifically related
 7 to one of the laws listed in § 1514A." *Id.* at 997 (quoting *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st
 8 Cir. 2009)); *see also Austin v. Tesla, Inc.*, No. 20-cv-00800-EMC, 2021 U.S. Dist. LEXIS 244414,
 9 at *16 (N.D. Cal. Jan. 26, 2021) ("An employee engages in protected activity when the employee's
 10 communications definitively and specifically relate to mail fraud³, wire fraud⁴, bank fraud⁵,
 11 securities fraud⁶, any rule or regulation of the Securities and Exchange Commission, or any
 12 provision of federal law relating to fraud against shareholders."). "As several courts have observed,
 13 the employee's allegations of wrongdoing must resemble shareholder fraud." *Andaya v. Atlas Air,*
 14 *Inc.*, 2012 U.S. Dist. LEXIS 78654, at *10 (S.D.N.Y. Apr. 30, 2012) (citing *Day* 555 F.3d at 55;
 15 *Van Asdale*, 577 F.3d at 1001); *see also Livingston v. Wyeth Inc.*, 2006 U.S. Dist. LEXIS 52978, at
 16 *29, 2006 WL 2129794 (M.D.N.C. July 28, 2006) ("To be protected under Sarbanes-Oxley, an
 17 employee's disclosures must be related to illegal activity that, at its core, involves shareholder
 18 fraud.").

20 ² Following the Ninth Circuit's decision in *Van Asdale*, the Department of Labor Administrative Review Board
 21 abrogated *Platone*. *See Nazif v. Coomputer Scis. Corp.*, 2015 U.S. Dist. LEXIS 78673, at *17-19, n. 5 (N.D. Cal., June
 22 17, 2015). However, the Ninth Circuit has not overruled *Van Asdale*, and thus continues to apply the "definitively and
 23 specifically" test adopted in *Platone*.

24 ³ The elements of wire or mail fraud are: (1) formation of a scheme or artifice to defraud; (2) use of the United States
 25 mails or wires, or causing such a use, in furtherance of the scheme; and (3) specific intent to deceive or defraud. *Sanford*
 26 *v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010) (citing 18 U.S.C. §§ 1341, 1343).

27 ⁴ *Id.*

28 ⁵ Bank fraud entails "knowingly execut[ing] . . . a scheme or artifice . . . to defraud a financial institution." 18 U.S.C. §
 29 1344. A scheme to defraud "must be one to deceive the bank and deprive it of something of value," that is, money or
 30 property. *United States v. Yates*, 16 F.4th 256, 264 (9th Cir. 2021) (quoting *Shaw v. United States*, 137 S. Ct. 462, 469,
 31 196 L. Ed. 2d 372 (2016)).

32 ⁶ Securities fraud requires proof that the defendant (1) "knowingly executed or attempted to execute a scheme or plan
 33 to defraud or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses,
 34 representations, or promises"; (2) "the statements made or facts omitted as part of the scheme were material"; (3)
 35 defendant "acted with the intent to defraud"; and (4) "the scheme was in connection with the purchase or sale of
 36 securities of [the publicly traded] company." *United States v. Hussain*, 972 F.3d 1138, 1146 (9th Cir. 2020)

1 Yet, here, Thompson's allegations do not directly relate to shareholder fraud or a violation
 2 of the SOX Act. He alleges ordinary allegations of property theft on a construction project. This is
 3 not wire fraud, mail fraud, bank fraud, or securities fraud. A claim of ordinary theft is not directly
 4 involved in Tesla's business of designing and manufacturing vehicles but is instead part of a
 5 facilities construction project where thefts of site materials can be commonplace. This would be a
 6 trivial matter to Tesla's business and shareholders and is not serious enough to merit protection of
 7 SOX. Thompson's claim should be recognized for what it is—an ordinary claim of
 8 retaliation/wrongful termination pled under the guise of SOX whistleblower protection. Plaintiff
 9 simply seeks to take SOX and turn it into a general retaliation statute.

10 Moreover, Plaintiff's SOX claim is likely maintained only for settlement value. This
 11 presents a valid basis to stay discovery pending resolution of the Motion to Dismiss. *Kor Media*
 12 *Group*, 294 F.R.D. at 583 (quoting *Turner Broadcasting*, 175 F.R.D. at 556). Plaintiff filed
 13 numerous claims in the Nevada's Second Judicial District which later went to arbitration via JAMS
 14 and resolved in favor of Tesla on a motion to dismiss and later motion for summary disposition. The
 15 bulk of Plaintiff's claims have already been resolved and all that remains now is a questionable
 16 claim of a time-barred SOX retaliation violation. Plaintiff now has the benefit of extensive and costly
 17 discovery as a result of the arbitration and is more aware now of the actual timeline of events that
 18 would bar his claim. Plaintiff also knows that discovery would be a costly process for Tesla, which
 19 involved thousands of documents and ESI production as well as depositions of multiple witnesses
 20 who interacted with Plaintiff, some of whom are identified in his complaint including Gustavo
 21 Herrera, Josh Brotnisky, and Jack Griffin. If the parties are going to have to engage in repeating
 22 such extensive discovery, the principles of Rule 1 are served by staying discovery until the Court
 23 has ruled on Defendant's Motions to Dismiss.

24 Under the rationale expressed in *Kor Media Group* and *Tradebay* above, there is absolutely
 25 no reason to "speed the parties along in discovery." Rather, this is a case where it is certainly more
 26 just and sensible to delay discovery to accomplish the inexpensive determination of the case.

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, Tesla Motors, Inc. respectfully requests the Court grant its
3 Motion and stay discovery pending the decision on its Motion to Dismiss.

4 DATED this 3rd day of June, 2022.

5 JACKSON LEWIS P.C.

6 /s/ Joshua A. Sliker _____

7 JOSHUA A. SLIKER, ESQ.
8 Nevada Bar No. 12493
9 KYLE A. HOYT, ESQ.
10 Nevada Bar No. 14886
11 300 S. Fourth Street, Suite 900
12 Las Vegas, Nevada 89101

13 *Attorneys for Defendant*
14 *Tesla Motors, Inc.*

15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 3rd day of June, 2022, I caused to be served a true and correct copy of the above and foregoing **DEFENDANT TESLA MOTORS, INC.'S MOTION TO STAY DISCOVERY PENDING DECISION ON MOTION TO DISMISS**, via the U.S. District Court, District of Nevada's CM/ECF electronic filing and service system, to:

Daniel R. Watkins
WATKINS & LETOFSKY, LLP
8935 S. Pecos Road, Ste. 22A
Henderson, Nevada 89074
dw@wl-llp.com

Jenny L. Foley
HKM EMPLOYMENT ATTORNEYS LLP
101 Convention Center Drive
Suite 600
Las Vegas, Nevada 89109
jfoley@hkm.com

*Attorneys for Plaintiff
Lynn Thompson*

Sean Hood
Shannon S. Pierce
Wade Beavers
FENNEMORE CRAIG, P.C.
9275 W. Russel Road
Suite 240
Las Vegas, Nevada 89148
shood@fennemorelaw.com
spierce@fennemorelaw.com
wbeavers@fennemorelaw.com

*Attorneys for Defendant
OnGlobal, Inc.*

/s/ Joshua A. Slicker
Employee of Jackson Lewis P.C.